Nos. 87-1589 and 87-1888

In the Supreme Court of the United States

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

THOMAS W. MERRILL
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's authorization of a rail line acquisition by a non-carrier: (a) relieves the selling railroad of any obligation to bargain with its employees under the Railway Labor Act concerning the sale; and (b) relieves the courts of the provisions of the Norris-LaGuardia Act prohibiting injunctions in cases involving labor disputes.

2. Whether the Railway Labor Act requires a railroad to postpone a sale of its rail lines to a non-carrier until the railroad has completed bargaining with its unions concerning the unions' proposed changes in the existing collective bargaining agreements that would address the effects of that sale.

3. Whether a court order requiring a railroad to continue its operations while it is bargaining under the Railway Labor Act violates the Fifth Amendment's prohibition against the taking of property without just compensation.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Air Line Pilots Ass'n v. *Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir. 1987)	13
Boys Markets, Inc. v. *Retail Clerks Union*, 398 U.S. 235 (1970)	18
Brotherhood of R.R. Trainmen v. *Chicago River & I.R.R.*, 353 U.S. 30 (1957)	18
Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969)	11
Burlington N.R.R. v. *United Transp. Union*, 848 F.2d 856 (8th Cir. 1988), petition for cert. pending, No. 88-711	18, 19
Chicago & N.W. Transp. Co. v. *Railway Labor Executives' Ass'n*, 855 F.2d 1277 (7th Cir. 1988), petition for cert. pending, No. 88-464	16, 18
Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, Ex Parte No. 392 (Sub-No. 1), 1 I.C.C.2d 810 (1985), review denied mem. *sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987)	3-4, 7
Detroit & T.S.L.R.R. v. *United Transp. Union*, 396 U.S. 142 (1969)	16
FRVR Corp.—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Co.—Petition for Clarification, ICC Finance No. 31205 (Jan. 28, 1988), review pending *sub nom. Railway Labor Executives' Ass'n* v. *ICC*, No. 88-1280 (8th Cir.)	8
First Nat'l Maintenance Corp. v. *NLRB*, 452 U.S. 666 (1981)	12, 13, 14
ICC v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987)	9

Cases—Continued: Page

International Ass'n of Machinists v. *Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972) 13
Order of R.R. Telegraphers v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960) 16-17
Railway Labor Executives' Ass'n v. *Chicago & N.W. Transp. Co.*, 848 F.2d 102 (8th Cir. 1988), petition for cert. pending, No. 87-2049 8
Railway Labor Executives' Ass'n v. *City of Galveston*, 849 F.2d 145 (5th Cir. 1988), petition for cert. pending, No. 88-517 8
Railway Labor Executives' Ass'n v. *Pittsburgh & Lake Erie R.R.*, No. 87-3853 (3d Cir. Oct. 14, 1988) 5
Textile Workers Union v. *Darlington Mfg.*, 380 U.S. 263 (1965) 12

Constitution, statutes and regulation:

U.S. Const. Amend. V 17
Interstate Commerce Act, 49 U.S.C. (& Supp. III) 10101 *et seq.*:
49 U.S.C. 10101 2
49 U.S.C. 10101a 2
49 U.S.C. (& Supp. III) 10301 *et seq.* 2
49 U.S.C. 10501 2
49 U.S.C. 10505 2
49 U.S.C. 10505(a) 3
49 U.S.C. 10505(d) 7
49 U.S.C. 10901 ..... 2, 3, 7, 9
49 U.S.C. 10901(c)(1)(A)(ii) 7
49 U.S.C. 10901(e) 7
49 U.S.C. 10903 2
49 U.S.C. 11341 9
49 U.S.C. 11341(a) 9
49 U.S.C. 11341 *et seq.* 2
National Labor Relations Act, 29 U.S.C. (& Supp. IV) 151 *et seq.* 12
Norris-LaGuardia Act § 4, 29 U.S.C. 104 ..... 1, 4, 6, 17, 18

Constitution, statutes and regulation—Continued: Page

Railway Labor Act, 45 U.S.C. 151 *et seq.*:
§§ 1-14, 45 U.S.C. 151-163 10
§ 2 (First), 45 U.S.C. 152 (First) 10, 14
§ 2 (Seventh), 45 U.S.C. 152 (Seventh) 10-11
§ 3 (First), 45 U.S.C. 153 (First) 16
§ 3 (Second), 45 U.S.C. 153 (Second) 16
§ 5, 45 U.S.C. 155 11
§ 6, 45 U.S.C. 156 ..... 2-3, 11, 12, 14, 15, 17
§ 10, 45 U.S.C. 160 11
§ 201, 45 U.S.C. 181 10
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 7
Fraudulent Conveyance Act, Pa. Stat. Ann. tit. 39, §§ 351-363 (Purdon 1954) 5
49 C.F.R. Pt. 1150 4

Miscellaneous:

53 Fed. Reg. 5981 (1988) 4

In the Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1589 and 87-1888

PITTSBURGH & LAKE ERIE
RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The Pittsburgh & Lake Erie Railroad Company (P&LE) petitions for writs of certiorari to review two related court of appeals decisions arising from P&LE's dispute with its labor unions over the railroad's proposed sale of its rail assets. The first petition, No. 87-1589, seeks review of a court of appeals decision holding that Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104, prohibits the courts

from enjoining a labor strike arising from the railroad's sale of rail lines to another company in a transaction authorized by the Interstate Commerce Commission (ICC). The second petition, No. 87-1888, seeks review of a subsequent decision by the same court of appeals holding that P&LE must first bargain with its unions over the effects of the railroad's proposed sale of its rail lines, pursuant to the provisions of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, before completing the sale.

1. P&LE is a small railroad that owns and operates 182 miles of rail line in western Pennsylvania and eastern Ohio. P&LE has experienced financial difficulties and, on July 8, 1987, it entered into an agreement to sell its rail lines to P&LE Railco, Inc. (Railco), a newly formed company that intended to operate those lines with a reduced contingent of employees. Railco's acquisition of P&LE's rail lines was subject to the ICC's approval in accordance with the Interstate Commerce Act (ICA), 49 U.S.C. (& Supp. III) 10101 *et seq.*[1] See 87-1589 Pet. App. A2-A3; 87-1888 Pet. App. 11a-13a.

When informed of the proposed sale, P&LE's unions requested the railroad to serve notices under Sec-

[1] The ICA establishes a national transportation policy to promote efficient, competitive carriage of goods and persons (49 U.S.C. 10101, 10101a) and creates the ICC to implement that policy (49 U.S.C. (& Supp. III) 10301 *et seq.*). The ICA grants the ICC broad jurisdiction over various forms of transportation, including rail carriage (49 U.S.C. 10501), and gives the ICC power to exempt carriers from ICA regulation (49 U.S.C. 10505). The ICA specifically regulates, inter alia, the construction and operation (49 U.S.C. 10901) or abandonment (49 U.S.C. 10903) of rail lines and the combination (including consolidation, merger and acquisition of control) of rail carriers (49 U.S.C. 11341 *et seq.*).

tion 6 of the RLA, 45 U.S.C. 156, and to commence collective bargaining with the unions over the effects on labor of its decision to discontinue its railroad business. P&LE responded that it had no duty to bargain under the circumstances. The unions then served Section 6 notices proposing changes to their collective bargaining agreements to give the employees greater protection in the event of a sale. The Railway Labor Executives' Association (RLEA), on behalf of P&LE's unions, thereafter brought an action in the United States District Court for the Western District of Pennsylvania to enjoin the sale and to force P&LE to bargain. On September 15, 1987, the unions commenced a general strike of the P&LE. See 87-1589 Pet. App. A3-A4; 87-1888 Pet. App. 11a-14a.

On September 19, 1987, Railco filed a "notice of exemption" with the ICC seeking exemption from the ICA approval process under the ICC's "non-carrier" exemption regulations. See *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), review denied mem. *sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).[2] Under *Ex Parte No. 392*, an ex-

[2] The ICA generally provides that a party may acquire a rail line only if the party first obtains ICC approval. See 49 U.S.C. 10901. However, the ICC is empowered to exempt a person, class of persons, or transaction from the Section 10901 approval process if it finds that ICC oversight is "not necessary to carry out" the national rail transportation policy and the transaction or service is of "limited scope" or the application of the relevant statutory provisions is "not needed to protect shippers from the abuse of market power" (49 U.S.C. 10505(a)). In 1985, the ICC established a blanket exemption for Section 10901 acquisitions by "non-carriers" (*i.e.*, new

emption becomes effective and the transaction may be carried out seven days after the filing of a notice by the acquiring entity unless a petition to revoke the exemption has been filed and granted or the transaction is stayed by the ICC. See *ibid.*; 49 C.F.R. Pt. 1150.[3] On September 25, 1987, the ICC denied RLEA's request for a stay, and on October 2, 1987, RLEA filed a petition to revoke Railco's exemption, which remains pending before the agency. See 87-1589 Pet. App. A4; 87-1888 Pet. App. 10a-14a.

Meanwhile, P&LE requested the district court to enjoin the RLEA general strike on the ground that the work stoppage was an illegal attempt to interfere with the ICC's exclusive jurisdiction over Railco's purchase of the rail line. The court ultimately agreed and issued an injunction. See 87-1589 Pet. App. B1-B10. The RLEA appealed, and the court of appeals summarily reversed the district court's decision. See *id.* at A1-A13 (*P&LE I*). The court held that Section 4 of the Norris-LaGuardia Act deprived the district court of jurisdiction to issue the injunction, rejecting P&LE's contention that the Norris-LaGuardia Act must be accommodated to the ICA, and remanded the case for a determination whether P&LE was obligated to comply with the RLA bargaining procedures. P&LE then petitioned this Court, in No. 87-1589, for a writ of certiorari to review that decision.

---

entrants into the railroad business), the so-called *Ex Parte No. 392* exemption. See 1 I.C.C.2d 810.

[3] On February 29, 1988, the ICC modified the *Ex Parte No. 392* exemption procedures to extend the notice periods and delay the effective date of the exemptions involving line sale transactions that result in the creation of larger railroads. 53 Fed. Reg. 5981.

2. On remand, the district court held that P&LE was obligated to bargain under the RLA concerning the effects of the proposed sale on its employees and enjoined the sale "to the extent that such sale does not include provisions for the maintenance of the status quo" (87-1888 Pet. App. 71a-85a). P&LE appealed, and the court of appeals affirmed the district court's decision. See *id.* at 1a-70a (*P&LE II*). The court of appeals concluded that the RLA required P&LE to bargain with its unions over the effects on labor of the railroad's proposed sale of assets and that the RLA's "status quo" provisions prohibited P&LE from completing the sale and eliminating any workers' employment during the bargaining process (*id.* at 16a-26a). The court rejected the contention that the ICC's exemption of P&LE's proposed sale from the requirements of the ICA relieved the railroad of its bargaining obligations (*id.* at 26a-57a). Judge Hutchinson dissented, concluding that "the RLA and the ICA are inherently contradictory in this respect and that Congress intended the ICA to prevail" (*id.* at 61a). P&LE petitioned this Court, in No. 87-1888, for a writ of certiorari to review the court of appeals' decision.[4]

---

[4] The court of appeals recently entered yet another decision arising from the RLEA's objections to P&LE's proposed sale of its rail assets. See *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, No. 87-3853 (3d Cir. Oct. 14, 1988) (*P&LE III*). The RLEA had brought a state court action seeking to enjoin P&LE's sale on the ground that it violated the Pennsylvania Fraudulent Conveyance Act, Pa. Stat. Ann. tit. 39, §§ 351-363 (Purdon 1954), and P&LE removed the action to federal court. The court of appeals held that removal was improper and instructed the district court to remand the case to the state court. No issue regarding this decision is presented by any of the petitions filed in this Court.

DISCUSSION

The United States submits that P&LE's petitions for writs of certiorari provide an appropriate opportunity for this Court to determine several questions of great importance to the railroad industry. The petition in No. 87-1888 squarely presents the question whether the ICC's authorization of a non-carrier's acquisition of existing rail lines relieves the selling railroad of any RLA obligation to bargain with its employees concerning the sale.[5] That petition also presents the question of the scope of the railroad's and the unions' bargaining and status quo obligations, an issue that would be reached if the Court determines that the ICC's authorization does not relieve the railroads of the RLA requirements. The petition in No. 87-1589 presents another significant related question; namely, whether, in the case of rail line sales, the ICC's authorization relieves the courts of the Norris-LaGuardia Act's prohibitions against injunctions in cases involving labor disputes. The determination of these issues, which have generated substantial disagreement among the lower courts, would provide significant assistance in resolving numerous pending disputes between the railroads and their unions over rail line sales.

---

[5] The ICC, which intervened through its own lawyers in the second court of appeals proceeding, has also filed a petition for a writ of certiorari seeking review of the court's determination that the ICA does not supersede the RLA. See *ICC* v. *Pittsburgh & Lake Erie R.R.*, No. 88-217 (filed Aug. 5, 1988). The Solicitor General has filed a brief amicus curiae expressing the United States' view that the ICC's petition should be dismissed because the ICC lacked statutory authority to participate in the court of appeals proceeding and to file the petition for writ of certiorari. See U.S. Amicus Br., *ICC* v. *Pittsburgh & Lake Erie R.R.*, No. 88-217.

1. Since the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, the ICC has encouraged the nation's railroads to sell, rather than to abandon, less profitable regional rail lines. The ICC has recognized that sale of these rail lines in lieu of abandonment frequently provides business opportunities for new, smaller, and more efficient carriers while preserving local rail service and related employment opportunities. An entity seeking to acquire a rail line must obtain ICC approval pursuant to the ICA (49 U.S.C. 10901), and the ICC has the discretion to condition its approval on the provision of measures to protect affected rail employees (49 U.S.C. 10901(c)(1)(A)(ii), (e)). Since 1982, the ICC generally has declined to provide such protection on the ground that it would effectively foreclose the formation of new rail carriers and would ultimately lead to further loss of jobs through the abandonment and dismantling of marginal rail lines. See 87-1888 Pet. App. 110a-111a. The ICC also has encouraged the trend toward sale rather than abandonment of rail lines through the development of a streamlined process—the *Ex Parte No. 392* class exemption—for prompt regulatory allowance of those transactions. See note 2, *supra*.[6]

P&LE elected to sell, rather than to abandon, its rail assets through a rail line transaction that would be governed by the *Ex Parte No. 392* class exemption. P&LE, like a number of other railroads and the ICC itself, maintains (87-1888 Pet. 11-17) that the ICC's grant of the class exemption to an acquiring company,

---

[6] In issuing *Ex Parte No. 392*, the ICC indicated that rail labor could file a petition under 49 U.S.C. 10505(d) to revoke the exemption in a particular transaction if exceptional circumstances justified labor protection. 1 I.C.C.2d 810, 815 (1986).

coupled with the ICC's decision to forgo the imposition of labor protective conditions, relieves the selling railroad of any obligations it might otherwise have to bargain with affected employees pursuant to RLA. The Third Circuit rejected that reasoning (87-1888 Pet. App. 26a-56a). The Fifth Circuit, in a similar context, has rejected that contention as well. See *Railway Labor Executives' Ass'n* v. *City of Galveston*, 849 F.2d 145, 149-152 (1988), petition for cert. pending, No. 88-517 (filed Sept. 26, 1988). The Eighth Circuit, however, has reached a contrary result. See *Railway Labor Executives' Ass'n* v. *Chicago & N.W. Transp. Co.*, 848 F.2d 102 (1988), petition for cert. pending, No. 87-2049 (filed June 14, 1988).

The United States has not endorsed the proposition, advocated by P&LE and supported by the ICC, that the grant of an *Ex Parte No. 392* exemption relieves the selling railroad of any RLA obligations that it might have toward employees affected by the exempted transaction.[7] We nevertheless agree that the question is important, and that P&LE's petition for a writ of certiorari in No. 87-1888 provides an appropriate opportunity for the Court to resolve the conflict among the circuits on this question. The Third Circuit's *P&LE II* decision provides a better vehicle for review than the Fifth Circuit's *City of*

[7] The ICC has set forth its views on the general question in its decision in *FRVR Corp.—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Co.—Petition for Clarification*, ICC Finance No. 31205 (Jan. 28, 1988), review pending *sub nom. Railway Labor Executives' Ass'n* v. *ICC*, No. 88-1280 (8th Cir.), which is reproduced in 87-1888 Pet. App. 109a-129a. The United States will set forth its views on the merits of this question through a brief amicus curiae if the petition in this case is granted.

Galveston decision because the latter decision to a large extent merely adopts by reference the reasoning of the former. And the Third Circuit's *P&LE II* decision provides a better vehicle for review than the Eighth Circuit's decision in *Chicago & N.W. Transp. Co.* because the latter decision, unlike the decision below, does not address the scope of the RLA bargaining and status quo obligations. Thus, as we explain in the following section, if the Court grants the petition in *P&LE II* and concludes that the grant of an *Ex Parte No. 392* exemption does *not* relieve the railroad of its RLA obligations, the Court can proceed to address the scope of those obligations, rather than to remand the case for further proceedings on that question.[8]

[8] The United States disagrees with respondent RLEA's suggestion (87-1888 Br. in Opp. 4) that this Court should resolve the issue through the grant of the petition for a writ of certiorari in *Railway Labor Executives' Ass'n* v. *Guilford Transp. Indus., Inc.*, No. 87-1911 (filed May 23, 1988). That case involves a transaction governed by Section 11341 of the ICA, which (unlike Section 10901) explicitly provides that carriers participating in transactions approved or exempted thereunder are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * * " (49 U.S.C. 11341(a)). See generally *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), slip op. 9-17 (Stevens, J., concurring). Thus, the principles that govern transactions subject to Section 11341 are not necessarily applicable to transactions subject to Section 10901 and the *Ex Parte No. 392* class exemption.

The United States also disagrees with respondent RLEA's suggestion (87-1888 Br. in Opp. 5) that this case may become moot insofar as P&LE no longer intends to sell its assets to Railco and is presently seeking another purchaser. The court of appeals concluded, based on P&LE's continuing attempts to find another buyer that would qualify for an *Ex Parte No.*

2. P&LE's petition in No. 87-1888 also challenges the court of appeals' determination that the RLA itself requires the railroad to bargain with its unions over the effects of its proposed transaction and that the RLA's status quo provisions prohibit effectuation of the transaction during the bargaining process. Those questions, which are not dispositively answered by this Court's past decisions, involve matters of fundamental importance to labor-management relations in the railroad and airlines industries.[9] The United States suggests that if this Court has occasion to reach those issues in this case, it should decide them.

The Railway Labor Act establishes an elaborate mechanism designed to encourage the peaceful resolution of labor disputes likely to disrupt interstate commerce. Section 2 (First) imposes a basic duty on carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" in order to avoid interruption to commerce or to carrier operations (45 U.S.C. 152 (First)). Section 2 (Seventh) further provides that no carrier "shall change the

---

392 exemption and the ICC's apparent willingness to grant such an exemption, that "each party continues to retain a 'legally cognizable interest in the outcome,' thus insuring a 'sufficient functional adversity' between the parties to justify the invocation of our jurisdiction" (87-1888 Pet. App. 15a-16a n.8 (citation omitted)). Indeed, P&LE's success in finding an alternative purchaser may well turn on resolving the legal uncertainty that has resulted from the Third Circuit's *P&LE II* decision.

[9] Both railroads and airlines are subject to the provisions of the RLA. See 45 U.S.C. 151-163, 181.

rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in [Section 6 of the RLA]" (45 U.S.C. 152 (Seventh)).

Section 6 of the RLA provides that carriers and employee representatives must "give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions" and must promptly agree to the time and place for the beginning of conferences to bargain over the proposed changes (45 U.S.C. 156). The parties may invoke the services of the National Mediation Board to assist in resolving their differences (45 U.S.C. 155). Once "such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier" (45 U.S.C. 156) until the negotiation, mediation, and cooling-off periods (including that associated with a Presidential Emergency Board, if one has been established) have expired (45 U.S.C. 155, 156, 160). See, *e.g.*, *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

The question in this case is how the RLA's bargaining and status quo obligations apply when a railroad proposes to undertake a sale of assets that, in turn, will lead to a reduction in its labor force requirements. The court of appeals rejected P&LE's argument that the RLA imposes no bargaining obligations at all when—as here—the sale of assets amounts to a decision to go out of business (87-1888 Pet. App.

16a-26a). The court of appeals acknowledged that P&LE is under no obligation to bargain with its unions over its actual decision to sell the assets; the RLA obligates a carrier to bargain, at most, over the *effects* of its decision on rail labor (*id.* at 16a, 24a).[10] Nevertheless, the court of appeals concluded that Section 6's command that a carrier shall not alter "rates of pay, rules, or working conditions" during the bargaining process prevents P&LE from taking actions to complete the sale and reassign or discharge employees, even if such actions are permissible under the existing collective bargaining agreements (*id.* at 17a-18a, 25a-26a).

P&LE relies (87-1888 Pet. 17) on this Court's decision in *Textile Workers Union* v. *Darlington Mfg.*, 380 U.S. 263 (1965), to support its contention that that the RLA imposes no bargaining obligations at all when a railroad elects to go out of business. In *Darlington*, a case decided under the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. IV) 151 *et seq.*, this Court held that when "an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice" (380 U.S. at 274). P&LE urges that the principle recognized in *Darlington* that the NLRA "does not compel one to become or remain an employer" (*id.* at 271), applied in the present context, should relieve the railroad of its RLA bargaining obligations.

[10] "This dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad" (87-1888 Pet. App. 16a (footnote omitted)). "We agree, and the union apparently concedes, that the railroad has no obligation to bargain over the underlying decision itself, *viz.*, to cease operating as a railroad and to sell its rail assets" (*id.* at 24a (citing *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 686 (1981)).

We think it clear that *Darlington*'s reasoning should extend to the issues presented in this case. Although the mandatory scope of bargaining under the RLA is "not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices" (*First Nat'l Maintenance Corp.*, 452 U.S. 666, 686-687 n.23 (1981)), the basic policies underlying *Darlington* should translate with equal or greater force in the railway and airline labor context. Indeed, because the ICC has the statutory authority to approve any abandonment, merger, or transfer of control of a rail line (see note 1, *supra*), and because the ICC has the authority to condition its approval of any such transaction by imposing appropriate labor protection measures (see page 7, *supra*), there is, if anything, *less* reason to require a rail carrier to bargain over a decision to go out of business than there is in the NLRA context.

The courts of appeals apparently have not given careful consideration to or clear guidance on the question whether and how the principles established in *Darlington* apply to cases arising under the RLA. Compare *Air Line Pilots Ass'n* v. *Transamerica Airlines, Inc.*, 817 F.2d 510, 512 n.1 (9th Cir. 1987) (stating that "effects bargaining may continue despite the cessation of flight operations") with *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 558-559 (1st Cir.), cert. denied, 409 U.S. 845 (1972) (stating that "[w]here it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffective unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all"). The Court

may therefore wish to take this opportunity to resolve this important question.[11]

A matter of equally pressing practical concern is the court of appeals' interpretation of Section 6's status quo requirements. The court of appeals has broadly held that if a rail labor union serves a Section 6 notice that proposes changes in a collective bargaining agreement, Section 6's status quo requirements prohibit the railroad from taking actions adverse to labor even though such actions would be permissible or authorized under the existing employer-employee relationship. That ruling is not required by the RLA's language or objectives, nor is it compelled by this Court's precedents.

As previously discussed, the RLA is concerned with formation and maintenance of "agreements concerning rates of pay, rules, and working conditions" (45 U.S.C. 152 (First)). Section 6 accordingly requires a carrier to bargain with a union concerning any proposed change in agreements affecting those three mandatory subjects of bargaining, and it further pro-

[11] Whatever the answer to that question, P&LE should not be required to bargain over its actual decision to sell its assets, a matter that is quintessentially a question of business judgment. The court of appeals concluded (and the unions apparently agreed) that P&LE is required to bargain only concerning the effects on labor of the proposed transaction. See note 10, *supra*. As this Court has explained in the NLRA context, "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *First Nat'l Maintenance Corp.*, 452 U.S. at 686. See also *id.* at 678-679 (footnote omitted) ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.").

vides that the carrier must continue to honor its extant obligations with respect to those subjects through the course of the bargaining process (45 U.S.C. 156). But while Section 6 instructs the carrier to preserve the "rates of pay, rules, or working conditions" (45 U.S.C. 156), it does not prevent the carrier from taking actions that are authorized under the existing collective bargaining agreements. Thus, the filing of a Section 6 notice need not prevent a railroad from undertaking management initiatives that will affect its work force, provided that those actions are taken in accordance with the railroad's present obligations to its employees as reflected in the existing "rates of pay, rules, or working conditions."

A substantial argument can be made, therefore, that the court of appeals erred in construing Section 6 as requiring the broad status quo obligation that the court imposed in this case. The court rested its decision in part on the premise that P&LE's proposed sale necessarily "would require a 'change in agreements affecting rates of pay, rules, or working conditions'" (87-1888 Pet. App. 17a) or would "*change* the nature of those agreements" (*id.* at 18a (emphasis in original)). But collective bargaining agreements frequently recognize, explicitly or implicitly, that an employer may make reductions in his work force or go out of business completely and often provide labor protection—including reassignment opportunities and severance pay—when the employer exercises that right.[12]

[12] A question occasionally may arise whether a collective bargaining agreement does or does not permit labor force reductions in certain circumstances. The resolution of that question, which turns on an interpretation of the agreement, is a "minor dispute" that is subject to mandatory arbitration by the National Railroad Adjustment Board (NRAB) or to its

Alternatively, the court reasoned that the *union* had proposed a change in the collective bargaining agreement, and that this proposal required P&LE to preserve the "objective working conditions out of which the dispute arose," including "the very existence of its workers' jobs" (Pet. App. 17a, 18a). As support for this proposition, the court relied upon *Detroit & T.S.L.R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). That decision, however, need not be read so broadly. *Detroit* may simply stand for the proposition that rates of pay, rules, or working conditions "need not be covered in an existing agreement" if, for example, they have "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Id.* at 153-154.[13] In any event, neither *Detroit* nor *Order of*

statutory alternatives. See 45 U.S.C. 153 ((First), (Second)). The court of appeals did not address that question here (87-1888 Pet. App. 16a-17a n.9). It is well settled (and not a matter of dispute in this case) that "if the subject matter of the parties' dispute is 'arguably comprehended' within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices" the matter falls within the exclusive jurisdiction of the NRAB. *E.g., Chicago & N.W. Transp. Co.* v. *Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1284 (7th Cir. 1988), petition for cert. pending, No. 88-464 (filed Sept. 16, 1988).

[13] This result naturally follows from the recognition that an employer-employee relationship frequently rests on implied understandings. "It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it if often omitted from the agreement and it has been suggested [by the RLEA] that this practice is more frequent in the railroad industry than in most others" (396 U.S. at 154-

R.R. Telegraphers v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), on which the court also relied, involved a decision to go entirely out of business through a sale of assets or otherwise.

In sum, the court's construction of Section 6 would allow the railroad's employees to nullify their collective bargaining agreements unilaterally and freeze the entire employer-employee relationship through the simple expedient of serving a Section 6 notice. That ruling may have far-reaching consequences for labor-management relations in the railroad and airline industry and warrants this Court's review.[14]

3. P&LE further contends, in No. 87-1589, that Section 4 of the Norris-LaGuardia Act, which provides inter alia that the courts shall have no jurisdiction to enjoin a labor strike (29 U.S.C. 104), does not deprive a federal district court of jurisdiction to enjoin a labor strike designed to block an ICC-approved rail transaction. The court of appeals rejected that contention, reasoning that Section 4, by its terms, would apply in this case and that the relevant ICA provisions give no indication that Congress intended that the ICA would override Section 4's anti-injunction policy (87-1589 Pet. App. A1-A13).

This question has practical importance since it typically is the first—and often the most pressing—

155 (footnote omitted)). See also *id.* at 159-161 (Harlan, J., concurring in part and dissenting in part).

[14] P&LE also contends that the imposition of a status quo injunction in these circumstances amounts to a taking of property without just compensation in violation of the Fifth Amendment. See 87-1888 Pet. 26-27. The court of appeals did not address that argument, which P&LE raised for the first time in that court. The United States submits that this novel question would not independently warrant this Court's review.

issue for the courts to decide in labor-management disputes arising out of rail line sales. This Court in other contexts has accommodated Section 4's prohibition against federal court injunctions of labor strikes with the terms and objectives of other statutes that address labor relations. See *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250-252 (1970) (Labor Management Relations Act); *Brotherhood of R.R. Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30, 41 (1957) (RLA). The question is whether there is a need for similar accommodation here. The answer depends, at least in part, on the answer to the first question presented: whether the ICC's approval of a rail transaction relieves the carrier of its RLA bargaining obligations. Obviously, it would make little sense to imply an exception to Section 4's prohibition in the case of an ICC-approved transaction if the railroad must bargain irrespective of the ICC's approval. We also note that the Eighth Circuit, which has concluded that the ICC's approval of a short-line transaction relieves the railroad of any RLA bargaining obligations (*Chicago & N.W. Transp. Co.* v. *Railway Labor Executives' Ass'n*, *supra*), has nonetheless held that ICC approval does not relieve the courts of Section 4's prohibition of labor strike injunctions. *Burlington N.R.R.* v. *United Transp. Union*, 848 F.2d 856 (1988).[15]

There presently is no conflict among the circuits on this question. Nevertheless, we would submit that

[15] The court reasoned that there is "no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here" (848 F.2d at 864), stating that "implicit in the congressional vision of a vigorous free market is the realization that all major participants in the economy must be left free to exercise their economic strength" (*ibid.*).

the matter is of a sufficient importance and close relationship to the questions presented in No. 87-1888 to warrant this Court's review.[16]

CONCLUSION

The petitions for writs of certiorari in No. 87-1589 and No. 87-1888 should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

THOMAS W. MERRILL
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

NOVEMBER 1988

[16] The ICC recently filed a petition for writ of certiorari in the *Burlington* case. See *ICC* v. *United Transp. Union*, No. 88-711 (filed Oct. 28, 1988). There, as in this case, the ICC lacked statutory authority to participate in the lower court proceedings and lacks authority to petition this Court for review. See note 5, *supra*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 60742